

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AMANCIO ABURTO-GAMINO,
#99059-179,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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Civil Action No. **3:14-CV-4365-L**
(Criminal Case No. 3:13-CR-193-L)

ORDER

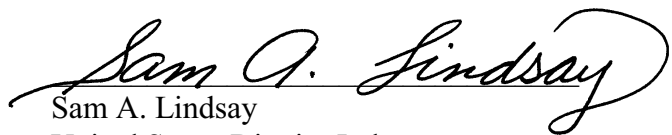
On January 11, 2017, United States Magistrate Judge Irma Carrillo Ramirez entered the Findings, Conclusions and Recommendation of the United States Magistrate Judge (“Report”), recommending that the court grant Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 with respect to Petitioner’s claim regarding an out-of-time appeal based on ineffective assistance of counsel and reenter the criminal judgment in Criminal Case No. 3:13-CR-193-L. The magistrate judge further recommends that the court dismiss without prejudice Petitioner’s remaining § 2255 claims. The Government agrees that Petitioner should be allowed to file an out-of-time appeal. No objections to the Report were received as of the date of this order.

Having reviewed the motion, briefs, file, record in this case, and the Report, the court determines that the findings and conclusions of the magistrate judge are correct, and **accepts** them as those of the court. Instead of granting Petitioner’s motion and request for relief under 28 U.S.C. § 2255, the court **grants** Petitioner’s request to file an out-of-time appeal and **denies without prejudice** Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. By separate document, the court will enter an amended judgment in Criminal Case No. 3:13-

CR-193-L, from which Petitioner can appeal. The only revision to the amended judgment will be the entry date. Proceeding in this manner achieves the same result and is consistent with the judicial remedy crafted by the Fifth Circuit for allowing out-of-time appeals. *See United States v. West*, 240 F.3d 456, 459-60 (5th Cir. 2001).

The court prospectively **certifies** that any appeal of this action would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. P.(a)(3). In support of this certification, the court **accepts and incorporates** by reference the Report. *See Baugh v. Taylor*, 117 F.3d 197, 202 and n.21 (5th Cir. 1997). Based on the Report, the court finds that any appeal of this action would present no legal point of arguable merit and would, therefore, be frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). In the event of an appeal, Petitioner may challenge this certification by filing a separate motion to proceed *in forma pauperis* on appeal with the clerk of the United States Court of Appeals for the Fifth Circuit. *See Baugh*, 117 F.3d at 202; Fed. R. App. P. 24(a)(5). If Petitioner files a notice of appeal, he must pay the \$505 appellate filing fee or submit a motion to proceed *in forma pauperis*.

It is so ordered this 7th day of February, 2017.


Sam A. Lindsay
United States District Judge